

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

TARIFF FILING OF EAST KENTUCKY POWER)
COOPERATIVE, INC. AND ITS MEMBER)
DISTRIBUTION COOPERATIVES FOR)
APPROVAL OF PROPOSED CHANGES TO THEIR)
QUALIFIED COGENERATION AND SMALL) CASE NO. 2017-00212
POWER PRODUCTION FACILITIES TARIFFS)
AND THE IMPLEMENTATION OF SEPARATE)
TARIFFS FOR POWER PURCHASES FROM)
SOLAR GENERATION QUALIFYING FACILITIES)

ORDER

This matter arises upon the September 29, 2017 joint motion of Bluebird Solar LLC (“Bluebird Solar”) and Great Blue Heron Solar LLC (“Great Blue Heron Solar”) (collectively, “Movants”) requesting a rehearing, pursuant to KRS 278.400, of the Commission’s Order issued on September 22, 2017, which denied Movants’ respective motions to intervene. In support of the rehearing request, Movants contend that the Commission erred in finding “as to the existence and effect for each [Movant] of a legally enforceable obligation under 18 C.F.R. §292.304 (“LEO”).”¹ Specifically, Movants assert that the September 22, 2017 Order failed to address the Federal Energy Regulatory Commission’s (“FERC”) September 7, 2017 Order in FERC Docket No. QM17-5-000, which involved East Kentucky Power Cooperative Inc.’s (“EKPC”) request to terminate its obligation under FERC regulation 18 C.F.R. 292.303(a) to enter into new power purchase contracts to purchase electric energy and capacity from qualifying facilities (“QF”) with a net capacity greater than 20 megawatts. Movants also contend

¹ Joint Application for Rehearing at 1.

that the September 22, 2017 Order failed to address EKPC's September 19, 2017 email to the Commission's interim executive director, which was filed into the record of this matter on September 21, 2017, as well as the notice filed by Bluebird Solar on September 21, 2017, regarding the effect of FERC's September 7, 2017 Order. Movants contend that they potentially have a LEO, relying on the language of FERC's September 7, 2017 finding that Bluebird may have established a LEO barring any restrictions under Kentucky law. Movants assert that EKPC has not cited any Kentucky statute, regulation, or case law that would prohibit or limit Movants' ability under the Public Utility Regulatory Policies Act ("PURPA") to create a LEO. To the contrary, Movants argue that there is no Kentucky law that would so restrict or impose preconditions upon a QF's ability to establish a LEO and the relevant Commission regulation, 807 KAR 5:054, mirrors PURPA and encourages qualifying cogeneration and small power production facilities. Movants contend that they have each established a LEO based upon their commitment to sell the output of their respective facilities to EKPC and their attempts in negotiating a formal agreement with EKPC. Movants argue that the Commission erroneously failed to determine that they had each established a LEO, which would enable Movants to effectively "lock-in" EKPC's currently effective tariffs and would allow Movants to petition the Commission via a complaint case to resolve any issues that might arise in connection with Movants' contract negotiations with EKPC.² Accordingly, Movants request that the Commission modify the September 22, 2017 Order to provide that the denial of intervention is based on a finding that each Movant has a LEO. In the alternative, Movants request that if there is a state law

² *Id.* at 11. See also Notice of Bluebird Solar LLC of FERC Ruling Affecting Intervention Request at 8-9.

restriction on their ability to establish a LEO, the Commission should provide Movants with notice of the specific restriction and allow Movants an opportunity to make a factual or legal showing concerning the restriction.

On October 6, 2017, EKPC filed a response objecting to the joint rehearing motion. EKPC argues that the September 22, 2017 Order denying Movants' intervention request was lawful and supported by the evidentiary record. EKPC asserts that Movants' rehearing motion simply repeats the same arguments that had been raised in their motions to intervene. Lastly, EKPC points out that the September 22, 2017 Order provides Movants with the proper method in which to have the issue regarding the establishment of a LEO adjudicated.

Having reviewed the joint motion for rehearing and the response thereto and being otherwise sufficiently advised, the Commission finds that Movants have failed to establish good cause to entitle it to the relief requested. Movants contend that the September 7, 2017 FERC Order in FERC Docket No. QM17-5-00 supports a finding that Bluebird Solar and Great Blue Heron have established a LEO in the absence of any Kentucky law that would restrict the creation of a LEO. Movants' reliance upon the FERC ruling is misplaced. In discussing when a QF may be grandfathered upon a utility's request for termination of the PURPA mandatory purchase obligation, the September 7, 2017 FERC Order states as follows:

PURPA and the Commission's regulations provide that a QF that has initiated a proceeding before the appropriate state regulatory authority . . . that may result in a legally enforceable contract or obligation prior to an electric utility filing its petition for relief pursuant to section 292.310 of the Commission's regulations, 18 C.F.R. § 292.310 (2017), will

be entitled to have any contract or obligation that may be established by state law grandfathered.³

The September 7, 2017 FERC Order goes on to quote from FERC Order No. 688-A the following:

[T]he date when an “obligation” under PURPA is established is the date such obligation is established by each state regulatory authority [In Order No. 688,] the Commission determined that a QF that has initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation prior to the electric utility filing its petition for relief pursuant to § 292.310 of the Commission’s regulations will be entitled to have any contract or obligation that may be established by state law grandfathered.⁴

FERC thus recognizes that the determination of whether and when a LEO is established under PURPA rests solely within the jurisdiction of the state regulatory commission. Here, there has been no formal proceeding before the Commission to determine the existence of a LEO with respect to either Bluebird Solar or Great Blue Heron in connection with their respective QFs and EKPC. Absent a LEO, neither Bluebird Solar nor Great Blue Heron has an interest in the rates or service of EKPC because neither is a customer of EKPC and, therefore, Movants lack the necessary justification to allow them intervention in this matter.

Movants also claim that, without a LEO, they have an interest in EKPC’s current QF tariffs because Great Blue Heron, in particular, “would be at risk that provisions of the proposed tariff would be approved in the midst of its negotiations toward a formal

³ September 7, 2017 FERC Order in FERC Docket No. QM17-5-00, at 7 (internal footnotes omitted). The FERC Order was attached to EKPC’s Notice of Filing on September 8, 2017).

⁴ *Id.* at 7–8 (internal footnotes omitted).

power purchase agreement[.]”⁵ The Commission disagrees and finds that a mere expectancy of an interest is not sufficient to permit Movants to intervene in the instant proceeding. 807 KAR 5:054, Section 7(4), provides that the rates for purchase of output from QFs with capacity in excess of 100 kilowatts shall be based on avoided costs, but expressly sets forth that “[t]hese rates shall be used only as a basis for negotiating a final purchase rate with qualifying facilities after proper consideration has been given to factors affecting purchase rates listed in subsection (5)(a) of this section.” 807 KAR 5:054, Section 7(5)(a), provides that the following factors shall be taken into consideration in determining the final purchase rate of a QF:

Availability of capacity or energy from a qualifying facility during the system daily and seasonal peak. The utility should consider for each qualifying facility the ability to dispatch, reliability, terms of contract, duration of obligation, termination requirements, ability to coordinate scheduled outages, usefulness of energy and capacity during system emergencies, individual and aggregate value of energy and capacity, and shorter construction lead times associated with cogeneration and small power production.

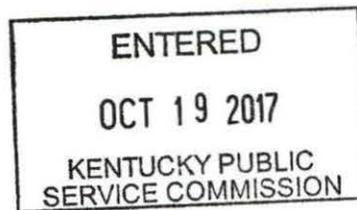
Thus, EKPC’s avoided costs are but one factor that is to be considered in connection with the negotiations of a purchase power agreement with a QF. Movants’ potential interest in the avoided costs of EKPC by itself is not sufficient to justify intervention in the instant matter and would complicate and disrupt the proceedings by allowing participation by entities that lack a present interest in EKPC’s rates. As we stated in the September 22, 2017 Order, each of the Movants may individually initiate a proceeding before the Commission for a determination of whether its proposed QF solar project qualifies as a LEO under 807 KAR 5:055, Section 7(4)(b). In addition to the issues that were stated in the September 22, 2017 Order that could be addressed via the filing of a

⁵ Joint Application for Rehearing at 12.

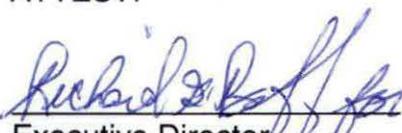
complaint or a petition for a declaratory order, the issues of whether and when a LEO has been established and how the avoided costs would be calculated could also be considered.

IT IS HEREBY ORDERED that Movants' Joint Application for rehearing is denied.

By the Commission



ATTEST:


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